IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4335 of 1987

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

R K VANKAR

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 4335 of 1987

MR PV HATHI for Petitioner No. 1

MR PRADIP D BHATE A.G.P. for Respondent No. 1

RULE NOT RECD BACK for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 27/01/2004

ORAL JUDGEMENT

In this petition, the grievance of the petitioner is that promotion to the post of Deputy Collector was

wrongly denied to him when it was due and his immediate junior was promoted to the said post bypassing his claim.

1.1. This petition was admitted on 7th March, 1988. However, during the pendency of the said petition, on 22nd April, 1993, the petitioner has expired and now his heirs have been brought on record of this petition. However, for the purpose of this judgment, the original petitioner will be referred to by the same nomenclature.

2. The petitioner joined the service of the respondent in the former Bombay State in 1956 and after passing the Revenue Qualifying Examination, he was promoted as Deputy Collector in the year 1971. In the month of December, 1980, he was promoted on Regular basis to the post of Special Deputy Collector, at Bhuj. The next promotional post was the post of Deputy Collector and he was due for promotion to the said post in the year 1986. However, on account of adverse remarks made in his Annual Confidential Report in the year 1984-85, he was considered unfit for promotion to the post of Deputy Collector and his junior was promoted to the said post vide order dated 10th November, 1986. It is the say of the petitioner that adverse remarks were made deliberately against him because of the fact that he had an occasion to displease the then sitting Member of Legislature Assembly of Bhuj and at her instance, his Annual Confidential Report was spoiled with a view to see that it created obstruction in the matter of promotion to the post of Deputy Collector. This was despite the fact that he had on many occasions received appreciation for his efficient service and ability to take work from his subordinate officers. Against the said remarks, he had made representation which was turned down mechanically. It may be noted here that so far the adverse remarks were concerned, they were to the effect that he was lacking in taking work from his subordinates and that his ability to take work from his subordinate was ordinary and he was not performing the work within the time limit fixed for it. The aforesaid remarks were communicated to him on 17th October, 1985 and the aforesaid representation was made by on 29th November, 1985.

2.1. By virtue of the order passed by this Court dated 7th March, 1988, respondent no.1 was directed to consider the petitioner for promotion as and when occasion to grant promotion arose next and it was directed that if the petitioner was found eligible for promotion he should be given promotion. In view of the said order, the respondent vide order dated 5th April, 1989, was promoted by the Selection Committee to the post of Deputy

Collector. As stated above, on 22nd April, 1993, while he was in his office, he expired.

3. In this petition, the question that is now to be decided is whether promotion was wrongly denied to the petitioner when it was first due and there was no sufficient reason for respondent no.1 to bypass the claim of the petitioner and to promote his junior i.e. respondent no.2 to the said post. Mr.P.V. Hathi, learned advocate for the petitioner has submitted that the petitioner had performed his duty right from the beginning with all sincerity and efficiently for which he had received appreciation from his superior officer on more than one occasion. He has further submitted that there was no reason for the petitioner to become all of a sudden lethargic and show indifference to the performance of his duty. In other words, according Mr.Hathi, the adverse remarks were made only as a result of the malafide action taken at the instance of then sitting M.L.A. of Bhuj. Mr.Hathi has further submitted that before making the adverse remarks, due procedure has not been followed by the respondent and that has caused prejudice to the petitioner. Lastly, he has submitted that now the petitioner has expired and his heirs have been brought on record, it is necessary to give deemed date of promotion to the petitioner and the incidental benefits to his heirs.

3.1. As against that Mr.Pradip Bhate learned A.G.P. appearing for respondent no.1 has submitted that the case of the petitioner was duly considered by the Selection Committee at the time of granting promotion to the post of Deputy Collector and on first occasion, because of the adverse remarks made in his Annual Confidential Report in the year 1984-85, he was found unfit and for that reason he was not promoted. He has further submitted that the Selection Committee has consider the case from all angles and when a decision not to promote him was taken, it was not open for this Court now to interfere with the same. Lastly, he has submitted that this petition has no merit and it deserved to be dismissed.

4. Having gone through the record of the petition as well as having carefully considered the rival submissions, it clearly appears that the petitioner had been in the service of the erstwhile Bombay State since 1956 and thereafter with present respondent no.1 till the time he expired in the month of April, 1993. It also appears that right from the post of clerk, he came to be promoted to the post of Deputy Collector. From the letters of appreciation that have been produced on record

by the petitioner, it is also clear that his superiors were completely satisfied with the performance of his duty and his ability to take work from his subordinates. It is a matter of surprise that in the year 1984-85, adverse remarks to the effect that his ability to take work from his subordinate was ordinary and that he was not completing the assigned work within the time limit. Whether these remarks were entered into the A.C.R. at the instance of the then sitting M.L.A. Bhuj, constituency is not for me to decide. However, as stated above, such adverse remarks made in the Annual Confidential Report in the year 1984-85 do give rise to some suspicion. Be that as it may, the question that remains to be considered is whether these remarks can be termed as valid and any action adverse to the interest of petitioner can be taken on the basis of it. In other words can they be allowed to exist on record. It is the say of the petitioner that before entering the remarks in the Annual Confidential Report no written communication was made to him bringing to his notice his shortcomings by his superior officer to enable him to overcome the same. The Apex Court in the case of Sukhdeo v. Commissioner Amravati Division, Amravati & Anr., reported in (1996) 5 S.C.C. 103 has laid down as follows:-

> "It would be salutary that the controlling officer before writing adverse remarks would give prior sufficient opportunity in writing by informing him of the deficiency he noticed for improvement. In spite of the opportunity given if the officer/employee does not improve then it would be an obvious fact and would form material basis in support of the adverse remarks. It should also be mentioned that he had given prior opportunity in writing for improvement and yet was not availed of so that it would form part of the record. The power exercised by the controlling officer is per se illegal."

5. Obviously, when no such information intimating the concerned employee about the deficiency noticed by the superior officer is given to him to enable him to overcome the same, there will be hardly any scope for the employee to improve upon the same and amend his mistakes. If such opportunity is not give, in the opinion of the Apex Court, the superior authority is not entitled to enter into his Annual Confidential Report such adverse remarks. It is also required to be noticed here that the nature of adverse remarks is to the effect that he has not been able to perform the work within the time limit and that his ability to take work from his subordinate

was ordinary. This Court in the decision rendered in the case of Shankerbhai G. Chaudhary v. State of Gujarat reported in 1998 (1) G.L.R. 668, has decided that such remarks cannot be termed as adverse remarks and they should not be taken into consideration at the time of promotion of the concerned employee. Thus, even the nature of the adverse remarks that have been entered into Annual Confidential Report of the petitioner for the year 1984-85 cannot create any obstruction for him in the matter of promotion. However, the Selection Committee has taken them to be a factor against the petitioner for granting him promotion to the higher post and that has been denied to him. It is really a matter of surprise that the same remarks still existed when on the next occasion that arose within a very short time, the petitioner was considered fit for promotion and he was duly promoted to the post of Deputy Collector. One fails to understand that when those remarks were considered as disadvantageous to the petitioner, in the matter of his promotion, within short time such remarks became ineffective and they were completely ignored by the Selection Committee while granting promotion to the petitioner. Obviously, the earlier decision of the Committee was totally erroneous. It also appears that the communication of the adverse remarks was made to the petitioner at a belated stage and this Court in the decision rendered in the case of N.K. Mehta v. State of Gujarat & Ors., reported in 1984 G.L.H. 133 has observed as under :-

> "If the remarks are communicated late, the first purpose for which it is communicated is lost. He does not get a chance to improve. Secondly, after lapse of considerable time he will not be able to point out in his representation that the allegations against him or the material on which assessment was based was wrong because in the meantime, the evidence might have been destroyed or the persons might have forgotten the events, and he might no be in possession of the relevant record, and therefore, his right to effective representation and proof will be lost.
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> The principle of communicating the adverse remarks is based upon the principles of natural justice and if the same is not observed the decision taken upon such void adverse remarks also suffers from the same infirmity and is liable to be quashed."

6. It is, therefore, clear that when the

communication of the adverse remarks is at a belated stage, they looses their legacy and they were required to be treated as non-existent for the purpose. Normally this Court would not interfere with the decision of the Selection Committee, but when the said decision appears to be based on adverse remarks which were as result of colourable exercise of power, this Court can certainly step in and quash such decision. The sum and substance of the aforesaid discussion is that the petitioner was wrongly denied promotion at the first instance, when his junior came to be promoted i.e. on 10th November, 1986, and that has caused injustice to the petitioner which is required to be redressed in this petition.

The result is that this petition is allowed. The respondents are directed to give deemed date of promotion to the petitioner i.e. the date on which his junior i.e. respondent no.2 was promoted to the post of Deputy Collector. The said date is 10th November, 1986 and the date of petitioner's promotion is 5th April, 1989. Now that the petition is allowed, his date of promotion will have to be considered as 10th November, 1986. Respondent no.1 is also ordered to grant all incidental benefits to the heirs of the petitioner by treating 10th November, 1986 as his date of promotion to the post of Deputy Collector. This exercise will have to be carried out within three months from the date of receipt of the writ of this order. This petition is, therefore, allowed. Rule is made absolute with no order as to costs.

[AKSHAY H. MEHTA, J.]

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